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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1968

No. 1150

DAVID H. DURHAM, Et Al., - - - Petitioners,

versus

THE MASON AND DIXON LINES, INC., - Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

EDGAR A. ZINGMAN,
JAMES N. WILLIAMS, JR.,
300 Marion E. Taylor Building,
Louisville, Kentucky 40202,

EDWIN O. NORRIS,
W. SCOTT TRUNDLE,
Post Office Box 179,
Kingsport, Tennessee 37662,
Counsel for Respondent.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Sixth Circuit (P. App. 1a-3a) is reported at 404 F. 2d 864. The District Court's order of dismissal (P. App. 4a) is not reported.

JURISDICTION.

The Petitioners have invoked the authority of this Court to review cases in the courts of appeal under 28 USC §1254(1), 62 Stat. 928.

STATUTE INVOLVED.

The statute involved in this case is section 301(a) of the Labor Management Relations Act of 1947, 29 USC §185.

QUESTIONS PRESENTED.

The Petition lists two questions for review (Pet. 2). Stated summarily they are: (1) Is an employee required to exhaust his contractual grievance procedures before seeking judicial relief on a claim that the employer has through a misrepresentation of material fact obtained the approval of the employee's union to a contract amendment? (2) Is this suit barred because Petitioners failed to exhaust their contractual remedies?

COUNTER-STATEMENT OF THE CASE.

Petitioners, employees of Respondent, sought to bring suit in the District Court for the Western District of Kentucky under Section 301 of the Labor Management Relations Act of 1947, 29 USC §185. In their Complaint and in their First Amended Complaint, Petitioners alleged that as of December 11, 1963, Respondent negotiated with the Petitioners' union, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, a "Change of Operations" which contained provisions relating to the seniority, compensation and other employment rights of Petitioners. This "Change of Operations" was approved by the Central States Joint Area Committee, a

joint group of representatives of the union and of the various employers, including Respondent, covered by the bargaining unit. This Joint Committee acts as an appellate review board for grievances arising under the contract and its decisions are final. The First Amended Complaint of Petitioners alleged that the approval of the Joint Committee was obtained due to misrepresentation of facts by Respondent. There was no allegation whatsoever in the Complaint or the First Amended Complaint of fraud on the part of the Respondent, nor was there any allegation of fraud by the union. Without complaining about the "Change of Operations" or filing a grievance under the contract, in May, 1966, some twenty-nine months later, Petitioners filed suit in the District Court.

The Respondent moved to dismiss on the ground that there was no allegation in the Petitioners' pleadings that the Petitioners had attempted to exhaust their contractual grievance procedures before seeking judicial relief. The motion to dismiss was also based upon a contention that the Complaint did not state a claim upon which relief could be granted. Without stating which ground it was relying upon, the District Court sustained Respondent's motion and dismissed the action. On appeal, the Sixth Circuit Court of Appeals affirmed on the ground that the Petitioners had made no showing that they had attempted to comply with their contractual grievance procedures.

ARGUMENT.

I.

The Case of *Republic Steel Corp.* v. *Maddox* Requires Petitioners to Exhaust Their Contractual Remedies Before Seeking Judicial Relief.

It is well established that, before an individual may bring an action to enforce rights arising out of a contract negotiated by his union, he must first seek a remedy through the procedures provided in the contract which he is attempting to enforce. In this connection this Court in *Republic Steel Corp.* v. *Maddox,* 379 U. S. 650 (1965), stated the general rule as follows:

> ". . . federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of contract grievance procedures agreed upon by employer and union as the mode of redress." 379 U. S. at page 652 (emphasis in the original)

In laying down this rule the Court there noted that ". . . it cannot be said in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so." 379 U. S. at page 653. In summary, the Court in *Maddox* held that ". . . unless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to

act on his behalf." 379 U. S. at page 653.[1] The rationale behind the *Maddox* rule is that good labor policy requires that the union be given an opportunity to press the employee's grievance. Any contrary rule would undermine the union's support by the employees. The only exception to the rule is where the union itself is engaging in discriminatory or other improper activities.

The lower courts have consistently followed this requirement that an employee's failure to resort to contractual remedies, prior to bringing an action under Section 301 of the Labor Management Relations Act, requires a dismissal. *Teamsters* v. *Uniform Rental Service,* 59 LRRM 2606 (M.D. Tenn., 1965) (unpublished); *Salvatore* v. *Allied Chemical Corp.,* 238 F. Supp. 232 (S.D. W. Va., 1965); *Wade* v. *Southern Pacific Co.,* 248 F. Supp. 493 (S.D. Texas, 1965).

Clearly, therefore, before an employee, by means of a suit under Section 301, may seek redress for the violation of rights established under a collective bargaining agreement, he must allege either that there is no contractual procedure which may be invoked to resolve the dispute, or that he has at least attempted to utilize the procedure established by the contract which he is attempting to enforce.[2]

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[1]See, *Rhine* v. *Union Carbide Corp.,* 343 F. 2d 12 (6th Cir., 1965), *reversing* 208 F. Supp. 785 (W.D. Ky., 1962). See also, *Broniman* v. *Great Atlantic & Pacific Tea Co.,* 353 F. 2d 559 (6th Cir., 1965), *cert. denied* 382 U. S. 907 (1966).

[2]*Woody* v. *Sterling Aluminum Products, Inc.,* 365 F. 2d 448 (8th Cir., 1966), *affirming* 244 F. Supp. 84 (E.D. Mo., 1965), *cert. denied* 386 U. S. 957 (1967); *Desrosiers* v. *American Cyanamid Co.,* ____ F. Supp. ____, 62 LRRM 2111 (D. Conn., 1966), *aff'd in part and reversed in part,* 377 F. 2d 864 (2d Cir., 1967); *Bsharah* v. *Electric Autolite Co.,* ____ F. Supp. ____, 64 LRRM 2231 (N.D. Ohio, 1967).

Petitioners have failed to allege either that they have exhausted or attempted to utilize the contractual grievance procedures with respect to their belated collateral attack upon the "Change of Operations." Nor did Petitioners allege, or even imply, that the contractual grievance procedures were unavailable to them. Thus, Petitioners have failed to meet the requirements imposed by this Court under the *Maddox* decision.

Infact, Petitioners made no effort to utilize their contractual procedures and thereby disregarded the basic requirement of federal labor policy which holds that their union must be afforded the opportunity to act in their behalf prior to the filing of an action under Section 301.

Petitioners have attempted to distinguish *Maddox* by stating that it applies only to the " 'normal situation' *i.e.,* where the grievance is based 'simply on the contract.' " This is a false distinction. In its reference to the "normal situation" this Court clearly was referring to the situation where the union is acting properly and not attempting to subvert the rights of the employees. This is what is "normality." The Court was discussing normality in the sense of the industrial situation, not the legal theories under which the parties were making claims. Clearly we do indeed have the "normal situation" in the present case and, therefore, *Maddox* totally governs the result in this case.

Petitioners have cited *Glover* v. *St. Louis-San Francisco Railway Co.,* decided January 14, 1969, —— U. S. ——, 89 S. Ct. 548. In reality, the *Glover* case

supports Respondent's position. In that case, the plaintiffs brought an action against both the employer and the union charging discrimination as a result of collusion between the union and the employer. *Glover* was an "abnormal" situation. *Glover* cannot in any way be considered as a precedent governing the present case. In addition, *Glover* involved a situation where resort to the grievance procedure demonstrably would be "futile." Such is not the case here.

II.

There Is No Conflict Between the Decision Below and the Cases Decided By the Second Circuit.

Petitioners have asserted that there is a conflict between the opinion below and the opinions of the Second Circuit Court of Appeals. This simply is not true. All of the opinions from the Second Circuit cited by Petitioners involved suits against unions and employers. That is a totally different situation from the present case. Here we have a suit against the employer only. The rights which are involved are contractual rights; therefore, this can only be an action to enforce the contract. Since there is a grievance procedure set up by the contract, *Maddox,* requires Petitioners to exhaust their grievance procedures and contractual remedies before they may come into court and seek judicial relief.

Petitioners have asserted that the Court below has treated "Maddox as having reversed *Humphrey* v. *Moore,* 375 U. S. 335 *sub silentio.*" The decision below has no such effect. As petitioners quite correctly point

out, the exhaustion claim was neither raised nor considered in *Humphrey* v. *Moore* and, therefore, that case cannot be considered as precedent governing the present situation. The rationale of *Humphrey* v. *Moore* and of *Maddox* is that where the union is engaging in improper activities, such as fraud, resort to the grievance procedure is useless. Both sides in the grievance procedure would be adverse to the employee. Such is not the situation in the present case. There has been no allegation of fraud on the part of the union in this case. There are not even any allegations of fraud by the employer. The union is, therefore, a perfectly proper and appropriate party to represent the Petitioners in presenting their grievances to the company. The rationale of *Humphrey* v. *Moore* and the rationale of the cases from the Second Circuit, cited by Petitioners, simply do not apply in the present case. In truth, there is no conflict between the Second Circuit and the Sixth Circuit on this issue and, therefore, there is no reason to grant certiorari.

Clearly none of the reasons for granting certiorari are present in this case. There is no conflict between the decision below and the position adopted by any other court of equal jurisdiction. Nor is this an important question of federal law which has not been, but should be, settled by the Supreme Court. The present case is clearly governed by *Maddox* as found by the Court of Appeals for the Sixth Circuit, and there is no need at this time for Supreme Court review.

CONCLUSION.

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

EDGAR A. ZINGMAN,
JAMES N. WILLIAMS, JR.,
300 Marion E. Taylor Building,
Louisville, Kentucky 40202,

EDWIN O. NORRIS,
W. SCOTT TRUNDLE,
Post Office Box 179,
Kingsport, Tennessee 37662,

Counsel for Respondent.